

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
JAMES F. HEIMERLE,

Petitioner-Appellee

-v.-

77-2119

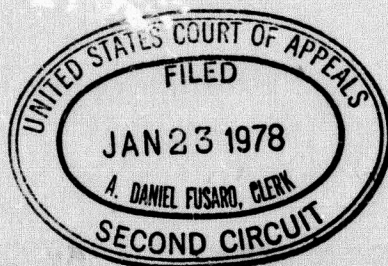
UNITED STATES OF AMERICA,

Respondent-Appellant
----- x

=====

APPENDIX
FOR
APPELLEE

=====



JAMES F. HEIMERLE
Appellee Pro Se
PMB 01873
Atlanta, Ga. 30315

PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

	<u>Page</u>
Motion to Dismiss Indictments IN RE Voice Exemplars 72 Cr 1330 & 1331	1
Hearing Transcript on Voice Exemplars IN RE 72 Cr 1330 & 1331, leave to remain in Federal Detention Refused	14
Docket Sheet, 76 Civil 5669	30
Docket Sheet, 76 Civil 4277	32
Docket Sheet, 72 Cr 1331	35
Government's Statement of Facts IN RE Opposition to 76 Civil 5563	38
United States v. LaBriola & Contino, - F. Supp. - , Decision & Order	41
Motion to File Supplement in 76 Civil 4277 IN RE Unconstitutional Wiretaps	45
Reply Affidavit to Government Reconsideration Affidavit & Brief	49
Motion to Correct Decision & Order nos. 76 Civil 4277 (RLC); 76 Civil 5669 (RLC)	52
Court of Appeals Order Dismissing Appeal in Speed v. United States, - F.2D. - ,	56
Government Confession of Error IN RE Writ Ad Prosequendum Violates Terms of IAD	58
Approval From Washington to Dismiss Speed Appeal due to Confession of Error	60-A
Judge Briant Order & Decision wherein Government concedes violation of IAD sub silentio	63
Judge Briant Re-Order & Decision wherein Court advises of Government concession to error, viz, IAD	69
76 Civil 4277 Petition IN RE unconstitutional wiretaps via unlawful court orders	73
76 Civil appeal [77-2060] Dismissal Order	78
Government Concession to Dismissal of 72 Cr 1330 [via 76- Civil 4277] for enhancement purposes	80
Notice of IAD Rights	81-A
Judge Carter's Letter advising that 76 Civil 4277 & 76 Civil 5669 were officially closed.	82

v.

UNITED STATES OF AMERICA,

Respondent-Appellant.

Noting that Barbara Jones
counsel for the appellant United States of America
has filed a Notice of Appeal, a Civil Appeal Pre-Argument Statement and
Transcript Information, and being advised as to the progress of the appeal

IT IS HEREBY ORDERED that the record on appeal be filed on or before
November 1. 1977

IT IS FURTHER ORDERED that the appellant's brief and the joint appendix
be filed on or before December 1, 1977

IT IS FURTHER ORDERED that the brief of the appellee be filed on or
before January 2, 1978 ~~1977~~

IT IS FURTHER ORDERED that ten (10) copies of each brief shall be filed
with the Clerk, but that the court may require as many as fifteen (15)
additional copies before final disposition of the action.

IT IS FURTHER ORDERED that the argument of the appeal be ready to be
heard during the week of January 16, 1978 ~~1977~~

IT IS FURTHER ORDERED that in the event of default by appellant in
filing the record on appeal or the appellant's brief and the appendix by
the time directed or upon default of the appellant regarding any other provision
of this order, the appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that if the appellee fails to file a brief within
the time directed by this order, such appellee shall be subjected to such
sanctions as the court may deem appropriate.

A. DANIEL FUSARO
Clerk

by

Frank J. Scardilli
FRANK J. SCARDILLI
Staff Counsel

-----X
UNITED STATES OF AMERICA,

-vs-

Indictment Number:

JAMES HELMERLE and JOSEPH CALISE et al,

72 CR 1330

Defendants.

-----X
S I R S :

PLEASE TAKE NOTICE, that upon the annexed Affirmations of JOSEPH FONTANA, ESQ. and EDWARD A. PANZARELLA, ESQ., Attorneys for the above named respective defendants and upon all of the papers and proceedings heretofore had herein, the defendants will move upon the trial of the above entitled action before the Honorable Robert L. Carter, Justice of the United States District Court, Southern District of New York, for an Order dismissing the indictment on the grounds that the defendants were granted immunity, and for such other and further relief as to this Court may deem just and proper.

Dated: Brooklyn, New York
April 30, 1973

Yours etc.,

FONTANA & GEOLY, ESQS.
by: Joseph Fontana -
Attorney for Defendant HELMERLE
and
EDWARD A. PANZARELLA
Attorney for Defendant CALISE
Office & P.O. Address
32 Court Street
Brooklyn, New York 11201

TO:

HON. WHITNEY NORTH SEYMOUR
United States Attorney
Southern District of New York

CLERK

United States District Court
Southern District of New York

HONORABLE ROBERT L. CARTER
Justice

United States District Court

-----x
UNITED STATES OF AMERICA,

-vs-

Indictment Number:

72 CR 1330

JAMES HEIMERLE and JOSEPH CALISE et al,
Defendants.

-----x
STATE OF NEW YORK)

ss.:

COUNTY OF KINGS)

JOSEPH FONTANA and EDWARD A. PANZARELLA, each being an attorney at law, duly admitted to practice in the State of New York, do hereby affirm under the penalty of perjury, except as to those matters stated to be upon information and belief, the following:

That the defendants herein were indicted in the above entitled indictment for the crimes of Conspiracy and substantive counts with respect to violation of Title 18, United States Code, Sections 472 and 473 (Counterfeit Federal Reserve Notes).

That upon information and belief, the Government has based its entire case upon intercepted electronic surveillance by way of wiretaps, etc.

That in a companion matter, i.e. Indictment #72 CR 1331 presently pending before the Honorable Charles L. Bricant, Jr., Justice of the United States District Court, Southern District of New York, which indictment is based on the very same wiretaps and electronic surveillance as in this case, the Government by Notice of Motion duly filed, moved for an order that the defendants perform exemplars of their voices.

That the defendants, and each of them, interposed objections to the taking of said exemplars and submitted a memorandum of points and authorities in opposition thereto.

Thereafter, by order of the aforesaid Justice Charles L. Bricant, Jr., dated March 19, 1973, the defendants JAMES HEIMERLE and JOSEPH CALISE were ordered to perform exemplars of their voices. A photocopy of said order is attached hereto and made a part hereof as Exhibit "A".

That thereafter, by written notice duly served and filed, the defendants and each of them declined to submit to the voice exemplars stating that "any submission and any answer to any question will constitute testimony and is in violation of defendant's constitutional right against self-incrimination". A copy of said declinations are attached hereto and made a part hereof as Exhibit "B" and "C" respectively.

That on March 29, 1973 and March 30, 1973 after a hearing before the Honorable Justice Charles L. Bricant, Jr., wherein the constitutional rights of the defendants were preserved, the defendants were ordered and directed to perform voice exemplars.

That pursuant to the said Order of Justice Bricant, the defendants were forced and compelled under the threat of contempt of Court to perform said exemplars in violation of their constitutional rights against self-incrimination.

Attached hereto and made a part hereof set forth as Exhibit "D" are copies of four (4) Exhibits used by the Government as voice exemplars of which the defendants were forced to perform.

It is respectfully submitted that Exhibit "D" clearly indicates that the defendants, and each of them, were forced and compelled to repeat and speak actual transcripts of wiretap and/or electronic surveillance interception which the Government intends to introduce on the trial of this action.

It is respectfully submitted that the Government must prove as part of its prima facie case by direct evidence the conversations which comprise Exhibit "D" attached hereto.

That the Government, under the guise of asking for the performance of voice exemplars, has demanded and obtained, contrary to the law, actual testimony by the defendants and each of them at a time when all of the protections of the Constitution of the United States against self-incrimination were in full force and effect.

It is respectfully submitted that the provisions of Title 18, Section 6002 and Section 6003, U.S.C.A. governs this proceeding.

WHEREFORE, your affiants pray for an Order dismissing the indictment herein and for such other and further relief as to this Court may deem just and proper.

Dated: Brooklyn, New York
April 30, 1973

JOSEPH FONTANA

EDWARD A. PANZARILLA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-vs-

Indictment Number:

72 Crim. 1331

JAMES HEIMERLE,

Defendant.

S. I. R. S. :

The defendant, JAMES HEIMERLE, respectfully declines to submit to any voice exemplar demanded by the Government in that any submission and any answer to any question will constitute testimony and is in violation of defendant's constitutional right against self-incrimination pursuant to Articles 4 and 5 of the Constitution of the United States of America.

Dated: New York, New York
March 29, 1973

L. J. H.
JAMES HEIMERLE

TO:

HONORABLE CHARLES L. BRIEANT
Justice - United States District Court
Southern District of New York

HONORABLE WHITNEY NORTH SEYMOUR
United States Attorney

CLERK- UNITED STATES DISTRICT COURT
Southern District of New York

Exhibit "B"

SOUTHERN DISTRICT OF NEW YORK

EX-10-273
S. D. N. Y.
RT

UNITED STATES OF AMERICA :

- v - :

JOSEPH CALISE
JAMES HEIMERLE, :

Defendants :

MICROFILM
NOV 17 1973

72 Cr. 1331

ORDER

Comes now the United States of America, by counsel,
and presents its motion requesting the Court to order the de-
fendants to perform exemplars of their voices in the above
cause which motion is in the words and figures as follows:

(U. I.)

CLB
USDS

And the Court having examined said motion and being
duly advised in the premises, now GRANTS said motion.

It is, therefore, ORDERED, ADJUDGED and DECREED that
the defendants, JOSEPH CALISE and JAMES HEIMERLE perform
exemplars of their voices in the same manner and order as
those of questioned exemplars germane to this cause, as may
be requested of them by Gerard J. Hinckley, Attorney for the
plaintiff. Said voice exemplars are to be performed in the
presence of their counsel, and Gerard J. Hinckley, Special
Attorney, United States Department of Justice. Further said
voice exemplars are to be performed at Room 1307, 26 Federal
Plaza, New York, New York, at 2:00 p.m. on March 23, 1973, or

earlier by agreement of counsel

Dated: New York, New York

MARCH 19TH 1973

Charles L. Briant, Jr.

HONORABLE CHARLES L. BRIANT, JR.
United States District Judge

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A-10

Date & Time: April 24, 1972 3:00 p.m.
Plant # 15 McKay Pl., Brooklyn, New York
Reel # 2872
Location :

Incoming call from Junior Calise to James Heimerle at 836-6918.

Heimerle Yea.
Calise Whats up?
Heimerle Not much.
Calise Did you find out for me.
Heimerle With that thing?
Calise Yeah.
Heimerle No, that guys gotta find out if he's in or out yet.
Calise No did you get me those things?
Heimerle No, theres a thing with them, Junior, in other words if somebody wants them, right, one day this week probably tomorrow, or Wednesday.
Calise Yeah.
Heimerle This is the way the guy worked it out, in other words they'll be there right.
Calise Yeah.
Heimerle Whoever is interested they bring the money.
Calise But I, you didn't even show them.
Heimerle Heres what I'm trying to tell you, and this is the only way I can work it with him otherwise I gotta take 200 and I don't want to.
Calise Well get me 200, you mean 200 thou?
Heimerle Yeah, in other words he'll give them to me and I gotta pay for them, and if I don't get rid of them, I'm gonna eat them, but its simple enough, all the guys gotta do is go there look at, in other words if he's buying 50, look, look through the whole 50, in other words forget about looking a 1 piece.
Calise Yeah, what good is going there, I don't want to get involved with anybody.
Heimerle Well thats the only way I can work it with him because,

A-11

Heimerle You don't, you know what's gonna happen here because this happens a lot, I show, they pick out the best, right, now the guy says I want them, so I go ahead and take them, right.

Calise Yeah, but this,

Heimerle Now when they come to the people and there's a little different, a little of them don't want them.

CONT'D

Calise These people if they like it, they order, if they don't I'll take it, they ain't going to do this to me.

Heimerle In other words they gotta have what?

Calise 1 & 1.

Heimerle They gotta have 7500 ready.

Calise The money's there, if they like them the money's there, that's what I'm saying.

Heimerle Alright.

Calise That's what I'm saying there's no problem.

Heimerle See I probably can get a sample, er, cause they're bringing the stuff in.

Calise Because they have been after me and I told him you went away for the weekend, y'know.

Heimerle He told me Tuesday or Wednesday, that the guys supposed to be coming in with it, in other words if I showed a thing to you right.

Calise If I had it tonight, say you brought me a sample tonight, right.

Heimerle I tell you, I'll know when he gets them, so as soon as he gets there I'll pick up one of each.

Calise Yeah, I'll need a ticket to Florida.

Heimerle And I'll show it to you, what for yourself?

Calise No.

Heimerle Alright, for when?

Calise For tomorrow.

Heimerle Coach.

Calise Yeah, one way.

A-12

Heimerle One way, what name?
Calise Girl.
Heimerle You gotta put the name on it Junior.
Calise Their name?
Heimerle Yeah, they ask for I.D. now, they're liable to.
Calise Alright, I'll get the name and call you back tonight.
Heimerle Ok, I'll tell you what, as soon as I hear the things
are in I go get one of each.
Calise Alright.
Heimerle And er, like I say, you gotta make it as fast as possible.
Calise Yeah, if I showed them tonight, they'll say tonight I'll
have it.
Heimerle Alright.

Calise Alright, Jim.
Heimerle Alright, as soon as I get it, I'll call you.
Calise Alright I'll let you know about the ticket tonight.
Heimerle Ok.

End of Conversation

A-13

Date & Time: April 14, 1972 6:36
Plant # 15 McKay Pl, Brooklyn, New York
Reel # 2871
Location :

Tel. # 836-6918

Outgoing call from James Heimerle to Joe
Calise at 415-343-1192.

Calise Hello.

Heimerle Hello, is Joe there?

Calise Talking, what's doing with you?

Heimerle I want to ask you something, this thing I talked to you about, did you talk to anybody?

Calise I certainly did, if fact I should have an answer in a day or two, I you coming in?

Heimerle I was gonna, I wanted to show you the thing, if somebody is interested,

Calise Right.

Heimerle I don't want to go out just for nothing.

calise Oh no, no, alright fine, I will call you sunday, I will have an answer tomorrow night.

Heimerle Could I ask you one thing in other words, what kinda thing are they talking about.

Calise What is the price that we have to ask?

Heimerle I told you fifteen.

Calise No that we have to ask, 15 cents?

Heimerle 15 cents, 16, 17.

Calise 15 cents on the dollar right.

Heimerle In other words anything over 15, right, is yours.

Calise In other words you could eat enough, Jimmy, for, in other words,

Heimerle When I see you I'll explain it to you, I wouldn't lie to you, I'll explain what I'm supposed to give,

Calise I figured if we can get twenty we can go half on the nickel.

Calise: If it's any more beautiful, I'll tell you just what I'm paying.

Calise: What?

Heimerle: I'm supposed to be paying 12, but he was talking in large orders.

Calise: Large orders right?

Heimerle: One large in other words.

Calise: This is what I want to do.

Heimerle: If you get a larger order I'm supposed to get 15, you follow me?

Calise: Right.

Heimerle: Because, I was gonna leave tonight with Freddie to go out there and I was gonna stop off at Miami on the way cause somebody wants one.

Calise: I see.

Heimerle: Where I'll collect 15, you follow me.

Calise: I see.

Heimerle: So I would have made the rounds and there's a guy in LA I want to see.

Calise: Ok are you going or not?

Heimerle: That's what I want to talk to you about, if you think there really ??? interested, I'll do it.

Calise: I'll tell you why. The first thing a couple people said, you gotta sample.

Heimerle: I know that that's the reason I wanna go out there and show it.

Calise: When you don't have a sample nobody wants to make a price.

Heimerle: You know where the rub comes in, next week, this week coming, they're gonna put them out, they already have orders for seven.

Calise: Oh they have.

Heimerle: Just the guy I'm dealing with, he's gotta an order for seven, right and I'm looking to make a few dollars.

A-15

Heimerle So if you would have took one and the guy in Miami takes one and the guy in LA takes one then that makes it ten, his order becomes ten, but they're start putting tem out next week.

Calise Oh, in other words they're not.

Heimerle They're not out.

Calise We're just taking the orders now.

Heimerle Yeah, but I gotta do it by next week, that's why I was gonna go out there.

Calise Alright I'm gonna see the guy soon, remember the ones I showed you the guy went to South America.

Heimerle Right, this is what I wanna ask you, if anybody wants, would they take a hundred, you know what I'm talking about.

Calise Yeah, a hundred thousand.

Heimerle Right, so if you talk along them orders, I'll run out there and we'll show it around.

Calise So what do you want me to do, want.

Heimerle Me call you tomorrow night, I would have went out there tonight if you had someone to look at them, you know who you're talking with.

Calise Right.

Heimerle If they're serious, they look at it they like it, they want it, I'll come back next week and deliver it.

Calise Right, in other words you're not taking any money, you're taking an order right, if say the man is ok, he'll have the money.

Heimerle Otherwise I'm going to be in a lot of trouble.

Calise I hope you're dealing with the people.

Heimerle No the guys good, in other words I wanna show it, I know you can't buy blind, that's why I want to come out there and show it.

Calise I'm gonna see the guy the first thing tomorrow morning, can I call you, are you gonna be home tomorrow?

Heimerle That's what I'm saying I'd catch a flight 11 o'clock tonight, I think I run out to the other guy.

A-16

Heimerle No, Miami and from there I'll go to LA.

Calise From there you'll go to LA.

Heimerle Yeah.

Calise But you keep in touch with me then.

Heimerle Yeah, of course.

Calise From LA pay 16 dollars and come and see me.

Heimerle I'm trying to find out if they're interested will they take a hundred.

Calise Alright that's what I'm gonna find out, you're going to Miami now, right?

Heimerle Yeah, I think I will tonight, yeah.

Calise Go to Miami tonight, then you're staying over right?

Heimerle Yeah.

Calise Then you're going to go to, you got this number, you can call this number, this is my mother-in-law's number.

Heimerle Right.

Calise This is where I make the calls from, call this number if I'm not at the house. You keep in touch with me I can't keep in touch with you.

End of Conversation

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 ----- x
4 UNITED STATES OF AMERICA :

5 vs :

72 Cr 1331

6 JOSEPH CALISE and JAMES HEIMERLE,

7 Defendants.
8 ----- x

New York, New York
March 29, 1973
2:20 o'clock p.m.

10 Before: HON. CHARLES L. BRIEANT, JR.,

District Judge.

13 Appearances:

14 GERARD HINCKLEY, Esq.,
Special Attorney, Department of Justice,
15 Attorney for the Government.

16 EDWARD A. PANZARELLA, Esq.,
Attorney for Defendant Calise.

17 FONTANA & GEOLY, Esqs.,
18 Attorneys for Defendant Heimerle;
JOSEPH FONTANA, Esq., of counsel.

19 - - -
20 THE CLERK: United States of America versus Joseph
21 Calise and James Heimerle.

22 MR. PANZARELLA: Edward A. Panzarella for Joseph
23 Calise.

24 MR. FONTANA: Good afternoon; Fontana & Geoly by
25 myself, Joseph Fontana, 32 Court Street, Brooklyn.

A-25

jk

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THE COURT: Where is your client, Mr. Fontana?

MR. FONTANA: Right here, your Honor. He was brought in from upstate and I visited with him shortly in the pen downstairs.

THE COURT: All right. Where is Mr. Calise?

MR. PANZARELLA: Right here.

THE COURT: All right; you gentlemen may be seated.

Now, are we all ready to go here? Is there anything that hasn't been taken care of? Has the government furnished what it was required to do?

MR. HINCKLEY: Your Honor, the government has made available, I would say, 90 per cent of the wiretapping conversations and the remainder will be made available shortly.

THE COURT: What does "shortly" mean to you?

MR. HINCKLEY: Within the week. It is just a matter of getting them. There is an application by defense counsel to listen to wiretaps that took place in San Francisco after the dates in this indictment and really would have little relevance, actually no relevance to this case, but defense counsel indicated they wanted them, and I have sent to California for permission to have them sent to me and I am advised that they will be forwarded to me and I should have them by the end of next week.

A-27

1 jk

4

2 more difficult. The wires we can play. The transcripts --

3 THE COURT: Play them within a week and you will
4 have the transcripts within ten days.

5 All right. Now, how are you gentlemen situated?

6 MR. PANZARELLA: Sir?

7 THE COURT: Have you disclosed enough to these
8 attorneys so they know what this is all about?

9 MR. HINCKLEY: Your Honor, I have advised them -- it
10 is a very simple case. This is mail fraud, a mail fraud
11 case involving sale of certain stolen airline tickets through
12 the mails. They have listened to the conversations in which
13 the arrangements were made for the letter to be sent and the
14 airline tickets to be sent through the mails. They have
15 been provided, I believe, with a transcript of that conversa-
16 tion. Essentially there are only a very few conversations
17 the government will use -- I think perhaps three conversa-
18 tions, in connection with this matter, and I think they are
19 familiar with them.

20 THE COURT: All right.

21 MR. PANZARELLA: That is very true, sir, but on Mon-
22 day evening, if I may speak --

23 THE COURT: Yes, I will hear you both.

24 MR. PANZARELLA: On Monday evening, at 4:30, we
25 had a pretrial conference before Mr. Justice Carter of this

A-28

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2 Court with respect to the present indictment pending there
3 wherein both of these defendants are defendants in that
4 indictment, number 72 Cr 1330.

5 THE COURT: Yes?

6 MR. PANZARELLA: At which time --

7 THE COURT: What are they charged with there so I
8 can be informed?

9 MR. PANZARELLA: They are charged with conspiracy
10 and with substantive counts relating to counterfeit monies,
11 sir.

12 THE COURT: I see.

13 MR. PANZARELLA: The wiretaps are all the same.
14 They are all the same wiretaps. We were furnished about
15 5:30, I believe it was, Monday night, when we left Judge
16 Carter to go to Mr. Hinckley's office, with Xerox copies of
17 the orders that Mr. Hogan of the New York County District
18 Attorney's office applied for. We are making a study and
19 we are challenging the wiretap orders.

20 Now, we intend very shortly, sir, to submit before
21 your Honor motions to suppress --

22 THE COURT: I will give you a day for that. Is
23 that going to require a hearing or will it be a matter of
24 law?

25 MR. PANZARELLA: I believe they may require a hear-
ing on it, sir.

A-30

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THE COURT: Yes, you have to look at it.

MR. PANZARELLA: However, I believe, your Honor, the mail fraud case is based on the wires that were obtained by Mr. Hogan's office and furnished to the government, and these are the wiretap orders that we are challenging so that it affects both the counterfeit case before Mr. Justice Carter and before your Honor, and those were the ones that were just furnished to us Monday night, as I say.

THE COURT: They are pre-indictment matters which he intends to use on the trial.

MR. PANZARELLA: That's right, sir.

THE COURT: When will you be able to make your motion?

MR. PANZARELLA: Well, Judge Carter gave us -- there are a series of motions there which include voice exemplars and then one of the attorneys in that case made a motion for the government to elect whether to try the conspiracy first or the substantive count first, and Judge Carter's order had that motion apply to all of the defendants--

THE COURT: Let me see the indictment, please.

MR. PANZARELLA: -- there, and he, Mr. Justice Carter, gave us until 12 noon on Friday, April 6th, to submit memorandum of law with respect to the challenges made, and also for Mr. Hinckley to challenge the order of Mr. Justice

A-31

1 jk

8

2 Carter with respect to this election which he granted.

3 THE COURT: You see, all that is of some interest.
4 However, I have an indictment here which was filed December
5 6, 1972, and it is now almost into April and I must proceed
6 in an orderly and fair manner here, but I must proceed. I can't
7 be constrained by such scheduling as you may have in your
8 counterfeiting case. It happens to be fortuitous that the
9 same defendants are charged with two totally unrelated
10 crimes, as I understand.

11 MR. PANZARELLA: Off of the same exact wires.

12 THE COURT: All right.

13 MR. PANZARELLA: Now, while the indictment was
14 filed December 6th, if you recall, sir, I submit a memorandum
15 of points and law to your Honor giving you the chronological
16 events as they occurred.

17 Now, Mr. Heimerle was not arraigned before Judge
18 Carter on this indictment until January 18th, I believe.
19 Mr. Calise was brought in from California wherein he resides
20 sometime in the latter part of December, at which time he
21 was arraigned on the counterfeit indictment before Judge
22 Carter and I appeared, and I had no idea whatsoever about
23 the mail fraud until January 18th, sir, when Mr. Heimerle was
24 brought in from States Prison, and arraigned on that.

25 Then Mr. Hinckley said -- they also have this in-

A-32

1 jk

2 dictment, that is before Judge Brieant.

3 THE COURT: All right. You are entitled to your
4 motion to suppress, and what I would like from you is when
5 you want to have it. Does it require an evidentiary hearing?
6 When will you have your motion papers ready, and we will
7 give you a day.

8 MR. PANZARELLA: May I ask Mr. Pontana?

9 THE COURT: Certainly.

10 (Pause.)

11 MR. PANZARELLA: May we respectfully ask for two
12 weeks, sir.

13 THE COURT: Well, I take it that all these same
14 issues are going to be submitted before Judge Carter.

15 MR. PANZARELLA: Yes, sir.

16 THE COURT: And I have no objection if you want to
17 give me Xerox copies of your brief, and you can put an addendum
18 on it for any facts which are different with this case.

19 MR. PANZARELLA: Yes, sir.

20 THE COURT: Now, two weeks would be the 12th of
21 April, which is the same day you are getting from Judge
22 Carter, so I see no objection to that at all, and you may
23 use Xerox to the extent it is helpful. Don't just give me
24 ritualistic material, but what you think is helpful.

25 So briefs and motion papers by -- served by April

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Is there anything else that you require, Mr. Panzarella?

MR. PANZARELLA: No, sir, not at this moment.

THE COURT: Mr. Fontana, are all your wants and needs taken care of?

MR. FONTANA: A similar situation; thank you, sir.

THE COURT: The same rulings would apply to you. Look over the problem carefully, go over it with your clients.

MR. PANZARELLA: Yes, sir.

THE COURT: And see what you think should be done with the matter. The trial date for Judge Carter is what?

MR. PANZARELLA: May 2nd.

THE COURT: May 2nd. All right.

MR. PANZARELLA: Yes, sir.

THE COURT: Did I interrupt somebody?

MR. FONTANA: I have a problem. Mr. Reimerle is lodged in Sing Sing, so that is the only problem I would have with his making trips up and forth.

THE COURT: I will have to issue a writ for him, that is all. He doesn't come any farther to come here than I do. They will bring him down.

MR. HINCKLEY: Your Honor, if I may, on March 19th

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2 your Honor signed an order requiring the defendants who are
3 here in court, Mr. Heimerle and Mr. Calise, to submit voice
4 exemplars. That was one of the reasons Mr. Heimerle was
5 writted down to provide those today.

6 There is a man from the Post Office authorities
7 waiting in my office to take these. I would ask your Honor
8 to direct the defendants to accompany me and counsel --

9 THE COURT: They have already been directed.
10 Counsel may be present when the exemplars are taken. The
11 exemplars are not to be unnecessarily lengthy or burdensome,
12 just a normal number of exemplars.

13 How many do you propose to take?

14 MR. HINCKLEY: I have about seven conversations
15 of Mr. Heimerle and about five of Calise. A number of the
16 conversations are the two gentlemen talking to each other,
17 so I don't think they will be too extensive. It will take
18 less than half an hour.

19 THE COURT: Counsel may be permitted to observe
20 that.

21 MR. PANZARELLA: Would you pardon us a moment? There
22 may be a problem with respect to voice exemplars.

23 THE COURT: What is the problem?

24 (Pause.)

25 MR. PANZARELLA: If your Honor please, on behalf of

A-51

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2 MR. HINCKLEY: Any time that this Court directs us
3 to be here, sir.

4 THE COURT: All right, 10 o'clock.

5 MR. PANZARELLA: 10 o'clock. Thank you very much,
6 sir.

7 THE COURT: Let's try to accomplish it with a minimum
8 of delay and difficulty, without sacrificing anybody's rights.

9 MR. PANZARELLA: Yes.

10 MR. HINCKLEY: Do I understand, your Honor, that
11 Mr. Calise is instructed by the Court to be here at 10 o'clock?

12 MR. PANZARELLA: Oh, we'll produce him here.

13 THE COURT: Yes, certainly. You understand that,
14 don't you, that you are required to be in this room at 10
15 o'clock tomorrow.

16 DEFENDANT CALISE: Oh, yes, sir.

17 THE COURT: There doesn't seem to be any difficulty
18 over that.

19 MR. HINCKLEY: Mr. Heimerle, he will be in West
20 Street for the night.

21 THE COURT: Either there or wherever the marshal
22 sees fit to put him. I had already satisfied the writ on
23 the assumption that you would not be back, so I will adjourn
24 the writ until tomorrow. Where the marshals keep him is up
25 to the marshals' discretion. He doesn't have to go back to

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2 THE COURT: All right. Now, would you like to
3 describe your machine?

4 MR. PANZARELLA: Yes, sir. The machine is a
5 Hitachi Cassette recorder, Model Number TRX 1260H.

6 THE COURT: All right. You may proceed, gentlemen.

7 MR. HINCKLEY: Well, your Honor, I would ask at
8 this time that the defendant, Mr. Heimerle, be called to the
9 stand and provide voice exemplars which Mr. Slavinski has
10 him to read.

11 THE COURT: All right. Mr. Heimerle, take the
12 stand, please. (Defendant Heimerle complied.)

13 MR. HINCKLEY: Now, Mr. Heimerle, I give you a
14 piece of paper with typing on it and there are names listed
15 on this piece of paper and to the right of those names there
16 are certain words. There is a name listed on this piece
17 of paper which is your name, it is Heimerle, and to the right
18 of your name there are certain words. I would like you to go
19 down this piece of paper, and wherever you see the name Heimerle
20 read and speak the word that is to the right of that. If it
21 is one word, just say the one word, then pause, and go to the
22 next time you see your name, and say whatever words are to the
23 right of that.

24 In some instances it will be just a word. In others
25 it will be a sentence.

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2 DEFENDANT HEIMERLE: You want me to say "Yeah"?

3 MR. HINCKLEY: Yes.

4 (Defendant Heimerle started to read from the
5 document.)

6 MR. HINCKLEY: Will you speak louder please.

7 (Defendant Heimerle continued to read from the
8 document.)9 MR. HINCKLEY: A little louder, please. I have
10 difficulty hearing.11 (Defendant Heimerle continued to read from the
12 document.)13 MR. HINCKLEY: Mr. Heimerle, I'd appreciate if you
14 could put the transcript a little bit to the side because
15 the transcript is between your voice and the microphone,
16 and speak just a little bit louder.

17 If we may have a moment?

18 MR. SLAVINSKI: Your Honor, can I say something
19 please?

20 THE COURT: Yes.

21 MR. SLAVINSKI: With this voice print taking we
22 must have the subject go down the sheet with no interruptions
23 in between so that we can compare it with the other tape.

24 THE COURT: Actually he was asked to stop --

25 MR. HINCKLEY: Pause.

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2 THE COURT: -- and pause at each point where the
3 words attributed to him on the transcript occurred, and I
4 think he was doing that.

5 MR. SLAVINSKI: That's right.

6 MR. HINCKLEY: Just so we get the tone, your Honor,
7 I'd like, if you would, could you speak loud enough for me to
8 hear you?

9 DEFENDANT HEIMERLE: Certainly.

10 MR. HINCKLEY: Could you speak a little louder?

11 DEFENDANT HEIMERLE: Yes.

12 MR. HINCKLEY: I think if you keep your voice at
13 that level, there'd be no problem.

14 You can start at any time.

15 (Defendant Heimerle continued to read from the
16 document.)

17 MR. PANZARELLA: May I ask for the record that
18 whatever this was be identified?

19 THE COURT: Yes, it will be marked for identification.

20 MR. HINCKLEY: It is a transcript of the conversa-
21 tion dated April 24, 1972 at 3 p.m. It was intercepted over
22 the telephone at 15 McKay Place in Brooklyn, New York.

23 THE COURT: Well, it will be marked for identification
24 and a copy of it made available to Mr. Panzarella.

xxxx

25 (Government's Exhibit 1 marked for identification.)

A-62

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2 MR. HINCKLEY: All right, now, I ask that another
3 transcript be marked Government's Exhibit Number 2 for identi-
4 fication. It is dated April 14, 1972, at 8:36 p.m.

xxxxxx

5 (Government's Exhibit 2 marked for identification.)

6 MR. HINCKLEY: Mr. Heimerle, I would ask you to do
7 the same thing with this document that you did with the other
8 one. Your name is listed in the left hand side and there are
9 words to the right of that, and I would ask you to read the
10 words to the right of your name each time it appears on that
11 document.

12 (Defendant Heimerle read from Government's Exhibit
13 2 for identification.)

14 THE COURT: Wait a moment.

15 MR. PANZARELLA: If your Honor please, this conversa-
16 tion relates to a case that is pending in another part, and I
17 object to the exemplar being taken with respect to the
18 matter pending in this Court, sir.

19 THE COURT: Well, I think the exemplar is only being
20 taken for purposes of voice identification. I had already
21 directed the government to provide, number one, that there not
22 be unusually burdensome number of readings and that he be
23 provided at least one thing which is innocent. However, if it
24 is a record they have of this voice from the same number, I
25 would permit him to read this, with the same ruling I made

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2 before -- I am adhering to. It is not necessarily admissible
3 in Judge Carter's case unless Judge Carter so directs.

4 MR. PANZARELLA: Yes, sir. And may I please note
5 my objection and exception, sir.

6 THE COURT: Oh, yes, you have a continuing objection
7 to the entire proceedings. You are in no way giving up or
8 waiving any of your client's rights. The only objection that
9 you need take now is if you find or believe that the method
10 of administering the test is in some way unfair or improper.

11 MR. PANZARELLA: Yes, sir.

12 THE COURT: In other words, all your objections
13 substantively are preserved. What I am here to see is that
14 the test is fairly administered, that is all.

15 MR. PANZARELLA: Thank you very much.

16 THE COURT: That is what you are here for. All
17 right.

18 MR. HINCKLEY: Your Honor, may I ask that Mr. Heimerle
19 speak a little louder? His voice tends to drop.

20 THE COURT: I think he is doing the best he can, but
21 it would be in his interest to speak up.

22 DEFENDANT HEIMERLE: I was under the impression we
23 were going to use other than all this.

24 MR. PANZARELLA: We are coming to it.

25 THE COURT: We are. We are. When you finish that

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one I'll give you something I have here on my desk which just happens to be here, has nothing to do with you.

(Defendant Heimerle continued to read from Government's Exhibit 2 for identification.)

MR. HINCKLEY: Did your Honor indicate that you had something?

THE COURT: Yes. I'd like you to read beginning at the pencil X, if you will, and going over to the next page to the next pencil X.

(Defendant Heimerle read from the document.)

MR. HINCKLEY: Your Honor, I have just one other item which I ask be marked as a Government Exhibit Number 3.

THE COURT: Mark it.

(Government Exhibit 3 marked for identification.)

MR. HINCKLEY: This has the initials J.H. on the left hand side and to the right of those initials there are some words, and there are also the initials J.C. and I don't want you to read what is to the righthand side of J.C., but just J.H.

I ask you to read -- this is from a transcript dated February 22, 1973.

I think if you use this paper to go down the line with it might help you in just keeping the J.H. and J.C. portions separate.

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2 (Defendant Heimerle proceeded to read from Govern-
3 ment's Exhibit 3 for identification.)

4 DEFENDANT HEIMERLE: Mr. Panzarella, do you object
5 to this, Mr. Panzarella?

6 MR. PANZARELLA: Mr. Heimerle, I have made the formal
7 objections on the record and the Judge has granted and noted
8 the objections and preserved any rights that you have, and this
9 is the exemplar that the Judge directed, so that at this moment
10 it is incumbent upon you to comply with the Judge's order with
11 respect to giving the exemplar, but your rights are preserved
12 as the Judge stated on the record.

13 (Defendant Heimerle continued to read from Govern-
14 ment's Exhibit 3 for identification.)

15 MR. PANZARELLA: If your Honor please, I object to
16 any further taking of exemplars. They're more than sufficient,
17 both with respect to the transcript -- this is actually the
18 giving of testimony, if your Honor please, and Mr. Hinckley
19 wishes --

20 THE COURT: I think he has given quite a few, Mr.
21 Hinckley.

22 MR. HINCKLEY: I have no additional transcripts,
23 but when your Honor directed me this morning to permit him to
24 give additional voice exemplars aside from the transcripts, I
25 prepared certain sentences for Mr. Heimerle to read which are

DIST/OFFICE	DOCKET YR. NUMBER	FILING DATE MO. DAY YEAR	J	N/S	O	R	R 23	DEMAND OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR. NUM
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PLAINTIFFS

HEIMERLE, JAMES

DEFENDANTS Judge Carter

UNITED STATES OF AMERICA

CAUSE

Motion to Vacate Sentence.

ATTORNEYS

James Heimerle pro se

~~# 01873-158~~~~150 Park Ave~~~~New York, N.Y. 10017~~

40 MRS MARGUERITE HEIMERLE
 2833 W 15 ST
 BRUNY, NY 11224

CHECK
HERE

DATE

FILING FEES PAID

RECEIPT NUMBER

C.O. NUMBER

STATISTICAL

76 civ 5660

James Holmberg -v- U.S. A.

Judge Carter

Page 2.

DATE	NR	PROCEEDINGS
12-20-76	1.	Filed Notice of Referral to Judge Carter.
12-20-76	2.	Filed Motion to Vacate Sentence. Ret. 12-28-76.
3-3-77	3	Filed Copy of Supreme Opinion #46054. ...Accordingly, the claims made as to violations of the Interstate Agreement on Detainers are w/o merit. Since claims of violations of his constitutional rights also have substance, the motion is w/o merit and must be in all respects denied...Carter, J. copy (filed in 76 Civ 4277 RLC)
3-28-77	4	Filed Plaintiff's Motion to reconsider plaintiff's motion to vacate...etc....no ret date given.
6-22-77		Filed Opinion #46051. = Deft. was delivered into federal custody on 1-18-73, pursuant a writ of habeas corpus ad prosequendum at which time he entered a plea of not guilty and was returned to state custody without first being tried on the federal INDICTMENT . He was again delivered into federal custody on 5-2-76, pursuant to a second writ of Habeas corpus ad prosequendum for pre-trial hearings and trial May 2-May 11. Since he was returned to state custody in January, 1973, without being tried on this indictment, he is entitled to dismissal of the indictment with prejudice. So Ordered ...Carter, J. (Filed in 76 civ 4277 RLC). M/N & Copies.

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Alison Case
for DEC

DEFENDANTS *Garter, J.*

UNITED STATES OF AMERICA

WJP

CAUSE

Vacate Sentence pur to 2255 Title 28

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1/3 MRS MARCELO HEIMELE
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BKLYN NY 11224

☒ CHECK HERE IF CASE WAS FILED IN FORM PAIDERS	DATE	FILING FEES PAID	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS
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UNITED STATES DISTRICT COURT DOCKET

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PLAINTIFFS

HEIMERLE, JAMES

DEFENDANTS

Carter, J.

UNITED STATES OF AMERICA

WJE

CAUSE

Vacate Sentence pur to 2255 Title 28

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01272

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UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/75)

**CRIMINAL DOCKET
UNITED STATES DISTRICT COURT**

JUDGE BRIEANT

72 CRIM. 1331

D. C. Form No. 100 Rev.

TITLE OF CASE

THE UNITED STATES

VS.

1) JOSEPH CALISE

2) JAMES HEIMERLE

ATTORNEYS

For U. S.: Special AUSA

William I. Aronwald (261-3930)

For Defendant:

STATISTICAL RECORD

COSTS

DATE

NAME OR
RECEIPT NO.

REC.

DISB.

J.S. 2 mailed

Clerk

J.S. 3 mailed / - 1

Marshal

Violation

Docket fee

Title 18

Sec. 1341 and 2, using the
mails in a scheme and artifice
to defraud, (cts. 2 and 3)
371 conspiracy so to do.

THREE COUNTS

DATE

PROCEDURES

12-6-72 Filed indictment and ordered sealed - 177 as to all defts. --- Motley, J.

12-7-72 Indictment ordered unsealed - Motley, J.

12-18-72 CALISE - Deft. pleads not guilty. --- MacMahon, J.

1-19-73 Filed Government's notice of readiness for trial.

1-24-73 Heimerle-Filed notice of appearance by atty Edward A. Panzarrella.
32 Court St, Bklyn N.Y. 11201 MA 50095.

2-1-73 Calise & Heimerle-Filed affidavit and notice of motion for an order
for the U.S. Atty to furnish discovery and inspection, bill
of particulars, suppression, etc.

3-5-73 Filed defts. memorandum of points and authorities.

3-14-73 BOTH DEFTS -Filed advt. of G. Hinchley, Special Atty. dtd. 2-21-73...

72 CR 1331

.2.

Brieant, J.

DATE	PROCEEDINGS
3-15-73	Filed govt's memorandum of points and authorities.
3-15-73	Filed Govt's memorandum of law.
3-14-73	Calise & Heimerle-Filed memorandum attached to motion dtd. 2-1-73 for Bill of particulars etc. Motion granted and denied as indicated in endorsement. Brieant, J.
3-19-73	Calise & Heimerle-Filed affidavit and order that the depts are to perform exemplars of their voices in the same manner and order as those of questioned exemplars germane to this cause., and the voices are to be performed at rm. 1307, 26 Federal Plaza 2:00 PM 3-23-73 Brieant, J.
3-19-73	HEIMERLE - Deft (att. present) pleads not guilty. Writ set aside. Brieant, J.
3-19-73	Calise & Heimerle-Filed memo endorsed on motion for an order directing the depts to provide voice exemplars. Motion granted order signed Brieant, J.
3-22-73	J. HEIMERLE - Filed advt. of G. J. Hinckley, Special Atty. dtd. 3-22-73. for a Writ.
3-30-73	J. Heimerle-Filed notice that the dept declines to submit to any voice exemplar in violation of his constitutional rights.
3-30-73	J. Calise-Filed notice that the dept declines to submit to any voice exemplar in violation of his constitutional rights.
3-16-73	JAMES HEIMERLE-Filed Writ of Habeas Corpus with Marshal's return-Writ Satisfied 2-15-73.
4-18-73	Both depts.- Filed defendants memorandum of points and authority.
4-19-73	Heimerle-Filed writ of habeas corpus dated 3-23-73 with Marshal's return 3-30-73, writ satisfied Brieant, J.
5-18-73	Calise-Filed copy of acknowledgment of dept's constitutional rights.
5-18-73	Calise (att. present) withdraws his plea of not guilty and pleads guilty to count 1 only. Pre-sentence investigation ordered. Sentence adjourned to 6/20/73. Bail continued.
	Heimerle- Trial adjourned to 9/24/73. Brieant, J.
6-14-73	Transcript of record of proceedings, dated March 29, 1973.
6-20-73	JOSEPH CALISE-Filed Judgment (Att. present) dept committed for imprisonment for a period of FIVE YEARS on ct. 1 Pursuant to Sec. 3651 of T1.18, U.S.C., as amended, with provisions: dept be confined in a JAIL TYPE institution for a period of SIX MONTHS, as provided in the aforesaid Sec. Execution of the remainder of the sentence is suspended and dept is placed on probation for a period of 4 1/2 years, subject to the standing probation order of this Court and to commence upon expiration of confinement. This sentence is to run concurrently with the sentence imposed by Judge Carter in 72cr.1330 insofar as it can. Cts. 2 and 3 are dismissed on motion of dept's counsel with consent of the Govt. Deft is remanded. Brieant, J. Entered 6-22-73.
6-21-73	CALISE- Filed notice of appeal to the USCA for the 2nd Circuit from judgment filed 6-20-73 (replied appeal to Dept. and US Atty)

1331

BRIANT, J.

Page 3

DATE	PROCEEDINGS
7-23-73	JOSEPH CALISE - Filed copy of judgment with marshals ret. Deft. delivered to Federal Detention Hdqrs. Jun. 20-73.
8-2-73	Filed notice that record has been transmitted to U.S.C.A.
Sep. 18-73	JAMES HEIMERLE - Filed Affdvt. for W/H/C Ad Pros. Writ issued Ret. 9-24-73.
9-26-73	JAMES HEIMERLE - Filed notice of appearance by Gary R. Sunden, 401 B'Way., N.Y.C. 10013 925-4848.
10-26-73	JAMES HEIMERLE - Filed CJA form 20. Order appointing Gary Sunden, Esq. 401 B'way NYC as counsel.
3-5-74	JAMES HEIMERLE - Filed affdvt. for W/H/C Ad Pros. Writ issued and Ret. 3-8-74.
4-23-74	JAMES HEIMERLE - Filed W/H/C - Writ satisfied 4-5-74. TENNEY, J.
7-8-74	JAMES HEIMERLE - Filed Affdvt. for W/H/C Ad. Pos. Writ ret. 7/22/74.
7-22-74	JAMES HEIMERLE - Deft. (Atty present, Gary Sunden) produced in Court on Writ of Habeas Corpus Ad Prosequendum. Deft. withdraws previous plea of NOT GUILTY and now pleads GUILTY to Count 2 only. Writ adj'd until 7-23-74 -- Briant, J.
7-23-74	JAMES HEIMERLE - Filed Judgment and Order of Probation. It is Adjudged that the Imposition of sentence on Count 2 is suspended. Deft. is placed on probation for a period of FOUR (4) YEARS, subject to the standing probation order of this court. Deft's probation is to commence upon expiration of confinement imposed by Judge Carter on June 18, 1973 in 72-CR. 1330. Counts 1 and 3 are dismissed on motion of Deft's counsel with the consent of the Government. -- BRIANT, J.
7-26-74	JAMES HEIMERLE - Filed Writ of Habeas Corpus directed to Warden, Greenhaven Correctional Facility, Greenhaven, NY, with Marshal's return - Writ satisfied 7-23-74 -- BRIANT, J.
8-21-74	Filed transcript of proceedings dated 7-22-74
7-24-74	J. HEIMERLE - Mailed original CJA copy 1 to the A.O. Wash.D.C. for payment... Briant, J.

3.

THE FACTS

On December 6, 1972 an indictment was filed in the Southern District of New York charging the defendants Joseph Calise and James F. Heimerle with violation of 18 U.S.C. §§ 1341 and 371. The court docket indicates that on January 24, 1973, Edward A. Panzarella, Esq. filed a Notice of Appearance on Heimerle's behalf. Further examination of the docket sheet indicates that on March 19, 1973 Heimerle was brought by way of a Writ Ad Prosequendum before the Court for arraignment and pled not guilty.* The writ was satisfied and he was returned to state custody. The defendant was brought by writ for a court proceeding concerning voice exemplars dated March 23, 1973. This writ was satisfied on March 30, 1973. Defendant Heimerle's trial was adjourned to September 24, 1973 on May 18, 1973. The defendant was writtten in for trial on September 24, 1973 and the writ was adjourned to September 26, 1973. The writ was satisfied on September 26, 1973. The trial date was postponed at that time, because Heimerle replaced his counsel with Gary R. Sunden, Esq. who filed a Notice of Appearance on September 26, 1973.

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The defendant was written in again ⁽⁴⁾ by affidavit filed March 5, 1974, returnable March 8, 1974, but not executed until March 22, 1974. This writ was adjourned to April 5, 1974 and satisfied ⁽⁴⁾ on that date. Jerome L. Merin, Esq., counsel for the United States, who executed the affidavit for the writ, stated that the writ was applied for because it was "necessary that the defendant appear and confer with counsel in order to enter prepare for trial."

On July 8, 1974 a writ was issued ⁽⁵⁾ returnable on July 22, 1974. The writ was adjourned to July 23, 1974 when it was satisfied ⁽⁵⁾. On July 22, 1974 Heimerle pled guilty to Count 2 of Indictment 72 Cr. 1331 and on July 23, 1974 the Court imposed a sentence of 4 years probation to commence upon his release from confinement pursuant to his conviction on Indictment 72 Cr. 1330.

On December 24, 1975 Heimerle was released from confinement pursuant to 72 Cr. 1330 and at that time began his probation sentence pursuant to 72 Cr. 1331.

On December 3, 1976 Heimerle filed a motion pursuant to 28 U.S.C. § 2255 for a withdrawal of his plea and a dismissal of

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Indictment 72 Cr. 1331. The defendant never served the Government with any notice or copies of his moving papers. On December 15, 1976, the Honorable Charles L. Bricant, Jr. issued an order and memorandum granting the relief Heimerle requested. The Court acted without having any response from the United States, which had never been served and therefore was unaware of the pending petition.* On December 17, 1976 the Honorable Milton Pollack informed the Government of Judge Bricant's action. This notification came as a result of the Government's petition for a probation violation hearing for Heimerle based largely on Heimerle's two criminal convictions for felonies committed while he was on probation.

Counsel for the United States requested the opportunity to file papers with Court in opposition to those previously filed by Heimerle. This was approved by the Court and Judge Bricant gave the Government until January 27, 1977 to file its response.

1C UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE UNITED STATES

75-CR-659

v.

MEMORANDUM and
ORDER

PAUL LABRIOLA and THOMAS CONTINO,

JUN 28 1977

Defendants.

COSTANTINO, D.J.

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ JUN 28 1977 ★
TIME A.M. _____
P.M. _____

This is a motion by defendants Labriola and Contino to dismiss the indictment against them on the grounds that the government violated the Interstate Agreement on Detainers, 18 U.S.C. App. (Pub. L. 91-538, §§ 1-8, Dec. 9, 1970, 84 Stat. 1397-1403). There is no dispute that each defendant, while serving a state sentence, was brought into federal court by way of writ of habeas corpus ad prosequendum, then returned to state custody without being tried. The United States Court of Appeals for the Second Circuit, in United States v. Mauro, 544 F.2d 588 (2d Cir. 1976) held that in such a situation, the federal indictment must be dismissed with prejudice.

The motions in this case were originally made

UNITED STATES DISTRICT COURT
DISTRICT OF NEW YORK

FILED

in April and May, 1976. On May 12, 1976, the parties requested that this court reserve decision on the motions until such time as the Court of Appeals decided Mauro, which was then pending. That decision was handed down on October 26, 1976. The government filed a petition with the Court of Appeals for rehearing en banc, and again requested that this court reserve decision on the within motions until that petition had been acted upon. Rehearing was denied by the Court of Appeals on March 15, 1977.

The government concedes that both Labriola and Contino fall within the factual ambit of Mauro. Nonetheless, it argues that the indictment in this case should not be dismissed because Mauro should not be applied retroactively. This court need not decide the retroactivity question, since it finds that the government is equitably estopped from raising the issue in the context of the present case.

It is apparent from a reading of the transcript of the May 12, 1976 oral argument that all parties understood that this court intended that the Court of Appeals' ruling in Mauro would be dispositive of these motions. That intention was made abundantly clear when the court,

43

in acceding to the parties' request to reserve decision until the Court of Appeals decided Mauro, stated that by doing so "I would know exactly whether or not you should continue or whether it [the indictment] should be dismissed." (Tr., May 12, 1976, p. 13). The government stated that it had no objection to such a procedure, and it is now bound by that statement. Cf. United States v. Alessi, 536 F.2d 978, 981 (2d Cir. 1976), cert. denied, ___ U.S. ___, 97 S.Ct. 384 (1976).

In addition, the defendants consented on May 12, 1976 to waive their speedy trial rights pending a decision by the Court of Appeals in Mauro. That waiver was predicated upon the understanding that the decision in Mauro would control the determination of the within motions (see Tr., May 12, 1976, pp. 16-17). The court agrees with defendant Contino that to allow the government to make its retroactivity argument after the lengthy delay involved in this case, particularly where the delay was for the specific purpose of awaiting the Court of Appeals decision in Mauro, would be unconscionable and would cast grave doubt on the validity of the defendants' waiver of their rights under the Sixth Amendment and the Speedy Trial Act, 18 U.S.C. § 3161 et seq. (See Defendant Contino's Memo-

randum of Law, pp. 5-6).

In light of the foregoing discussion, and without deciding the broad question of whether Mauro is to be applied retroactively, the court finds that Mauro must control the disposition of these motions. Accordingly, the indictment against defendants Labriola and Contino must be, and is, dismissed. Defendant Labriola's bail is hereby exonerated. So ordered.

W. G. Latta
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

----- x

JAMES F. HEIMERLE,
Plaintiff

NOTICE OF HEARING

76 Civ. 4277 (RUC)

VS.

UNITED STATES OF AMERICA,
Respondent

----- x

PLEASE TAKE NOTICE, that the undersigned will move this Court at a term thereof to be held on May 30, 1977 at 10:00 A.M. in the forenoon or as soon thereafter as he may be heard, for permission to file a Supplementary Memorandum of Law as regards the above-entitled case and for such other and further relief as to the Court may seem just and proper.

Respectfully etc.


James F. Heimerle
PE 01673
Atlanta, Ga. 30315

DATED: May 16, 1977

TO: Hon. Robert B. Fiske
U.S. Attorney-S.D.N.Y.
U.S. Courthouse-Poley Square
New York, N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
JAMES F. HOLMORLE,
Plaintiff

NOTION TO FILE SUPPLEMENTARY
MEMORANDUM OF LAW

76 Civ. 4277 (RUC)

vs.

UNITED STATES OF AMERICA,
Respondent

----- x
JAMES F. HOLMORLE, Plaintiff, petitioner herein, moves the Court to file a Supplementary Memorandum of Law in addition to previously filed Memorandums so that the Court may be furnished with additional authorities that may help to bring the above-entitled cause to the point of resolution.

Respectfully submitted,


James F. Holmorle
Petitioner pro se

Sworn to before me this
16th day of May, 1977

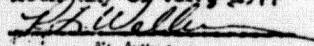

Notary Public Authorized by the Act of
July 7, 1955 to Administer Oaths (18 U.S.C.
4004).

CERTIFICATE OF MAILING

JAMES WILLIAMS, being duly sworn, deposes and says: that on the 15th day of May, 1977 I have placed into a mail-box maintained by the Warden of the Atlanta Federal Penitentiary the attached papers addressed tot the Hon. Robt. B. Fiske-U.S. Attorney-S.D.N.Y., U.S. Courthouse-Joley Square, New York, N.Y.


James Williams
01873
Atlanta, Ga. 30315

Sworn to before me this
16th day of May, 1977


J. H. Walker
Authorized by the Act of
Oct. 7, 1955 to Administer Oaths (12 U.S.C.
1034).

PRO SE OFFICE
UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
OFFICE OF THE CLERK
U. S. COURTHOUSE

RAYMOND F. BURGHARDT
CLERK

FOLEY SQUARE, NEW YORK, N. Y. 10007

Date: 9-22-77

James F. Heirmerle
c/o Mrs. Marguerite Heirmerle
2833 West 15th Street
Brooklyn, New York 11224

Reply Affidavit

76 Civ. 4277
76 Civ. 5669

(☒) Your papers are returned herewith, for the following reason(s):

() For resubmission with the filing fee of \$15 in money order, certified check, or official check, payable to Clerk of Court, U.S. District Court, S.D.N.Y., OR attestation of poverty (form enclosed).

(☒) I see no indication that these two cases are consolidated. You must file two separate replies (One for each case).

() Your signature is lacking wherever we have placed a red X.

(☒) Do you ~~wish~~ want your mail sent directly to you? If so send your new address

() We require an ORIGINAL for the court, a copy for the Pro Se Office, and a copy for each defendant you have named in the caption. If you are suing the United States, or any of its agencies, add 3 MORE COPIES. The total you must send us is one ORIGINAL plus _____ copies. The ORIGINAL must have an original signature.

() You must name each defendant you wish to sue specifically, and you may not add "et al." in the caption. If you do not know the name of someone, but can describe the title or job held, you may name them as "Jane Doe" or "John Doe."

() Your papers do not meet our minimum requirements as to () legibility. Please type or hand print clearly.

() language. Only English is acceptable.

() form or content. Form or Instructions enclosed.

() Do not serve a copy on anyone at this point. We will advise you

NOTE: Please do not telephone or write to inquire about receipt or progress of your complaint, as this is what delays processing of complaints. You will receive a card of acknowledgment when your case is reached IN TURN. Later you will be notified of your docket number and judge, which number and name MUST appear on all future writings about that case.

Sincerely yours

M. Watts
Mrs. M. Watts, Deputy Pro Se Clerk

AUG 2 1977

49

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES F. HEINEMAN,
Petitioner

-against-

UNITED STATES OF AMERICA,
Respondent

REPLY AFFIDAVIT

76 Civil 4277
76 Civil 5669

STATE OF GEORGIA)
: ss:
COUNTY OF FULTON)

JAMES F. HEINEMAN, being duly sworn, deposes and says:

I am the petitioner in the above captioned cause and I make this affidavit in good faith for the following reasons:

1. On the 25th day of July 1977 this petitioner received a response by way of letter from the Court advising that there is no need for Findings of Fact and Conclusions of Law pertaining to the alleged illegal state wiretaps due to the fact that the granting of relief on the Interstate Agreement on Detainers renders the questions presented on the legality of the New York State wiretaps moot.
2. On the 26th day of July 1977 this petitioner received a copy of an extensive memorandum of law and affidavit, wherein, reconsideration is sought from this Courts order of June 22nd 1977; it is presented untimely pursuant to Rule 9 (m) of the Local General Rules, even with the additional time allowance provided under Rule 45 (c) Fed.R.Crim.P.; and there is no explanation for the untimeliness: Also, Rule 9 (m) requires a brief statement as to why reargument is sought, it should be Judicially noticed that the brief statement consists of approximately 25 pages; and that the respondent is presenting to this Court what should rightfully be presented to the Court of Appeals for the Second Circuit.
3. It is submitted that the Statement of Facts contained in U.S.Code Cong. & Adm. News 91st Congress 2d Sess at 4665, wherein it states:
"...as was stated, prosecutors also can initiate proceedings to obtain trials of prisoners in other jurisdictions against whom charges are pending.....or.....detainers have been lodged."

When the above statement is taken in context with Article IX B :

"...all courts.....are hereby directed to enforce the agreement on detainers.."

And Article IX B 1 "...the United States Attorney shall....."

such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this act."

And Article IX § 8 provides:

" This act shall take effect on the nineteenth day after the date of its enactment."

And the Courts opinion in U.S.v. Cyphers, ___ F.2d ___ (Feb.8,1977);

wherein the Court held:

" While the policies underlying Rule 12 (f) are helpful guides, they are not determinate in construing a statute. Article III of the Agreement provides that the defendant shall be brought to trial within 180 days after the detainer has been lodged provided that he makes a written request to that effect. Article IV (e), on the other hand, makes no reference to a request by the prisoner and says "if trial is not had on any indictment...prior to the prisoner's being returned to the original place of imprisonment...such indictment...shall not be of any further force or effect, and the court shall enter an order dismissing same with prejudice." In other words, if a state in which a prisoner is charged does not take the initiative to bring a prisoner back for trial the prisoner may require it to do so rather than suffer indefinitely the effects of the detainer on his imprisonment in the state of his incarceration. If a state does take the initiative and bring him from the state of imprisonment to the accusing state it must complete the prosecution before returning him..."
(language partially added)

And it would be totally inconsistent that the Agreement is cognizable under section 2254 as a Federal Law, U.S.ex rel..v..Sola v. Brookes, 520 F.2d 830,834-35; and not be cognizable under section 2255, as is suggested by the respondent.

4. It is also submitted that the Court in Heimerle v. U.S., 5563 Civil; which was the companion case that this petitioner was arraigned on on January 18th 1973 under indictment(s) 72 CR 1330 and 72 CR 1331; has just granted reargument to the government based solely on the fact that a guilty plea was entered in the case before that court. However, the Court did adhere to its prior opinion insofar as:

" The prior opinion of the Court was correct, insofar as it goes. Certainly a waiver is nothing more than the intentional relinquishment of a known right, and there was no waiver on Heimerle's part simply by the fact that he permitted the successive writs ad prosequendum to be satisfied, and was returned to the Ossining Correctional Facility without protest on his part.....Here, Heimerle lost out with respect to a right which no person skilled in the law then would have imagined existed in his favor. Had he gone to trial on the merits and been convicted, the Court would believe that this right was still preserved to him, and would adhere to its prior decision....."

5. It should also be noted that the decision of Judge Aricant rendered on July 6th 1977 granting reargument is presently under reconsideration pursuant to Rule 9 (n) of the Local General Rules.

6. It is also submitted that the government lost jurisdiction after allowing the writ to be satisfied approximately 35 days after petitioner was written into the jurisdiction for the sole purpose of prosecuting;

4)

petitioner on both indictments: As substantive proof of same the docket entries of both prosecutions emphatically show that on the day after petitioner was arraigned; notices of readiness for trial were filed in both Courts: Thus, the government was wholly and solely responsible for the loss of jurisdiction that entailed when they did not protest the satisfying of the very first writ.

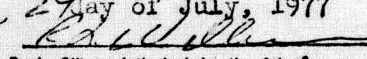
7. In conclusion it is submitted that should the Court entertain the respondents motion for reconsideration after advising petitioner that "...both matters have therefore been officially closed": petitioner would respectfully move to have the Court at that time state the findings of fact and conclusions of law as they would relate to the questions presented regarding the illegally and unconstitutionally procured New York State wiretaps.

Wherefore, it is prayed that the respondents memorandum of law be in all respects denied.

Respectfully submitted,


James F. Heimerle
Petitioner pro se

Sworn to before me this
27 day of July, 1977

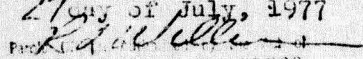

Parole Officer: Authorized by the Act of
July 7, 1955 to Administer Oaths (18 U.S.C.
4004).

AFFIDAVIT OF MAILING

JAMES F. HEIMERLE, being duly sworn, deposes and says:

I have placed into the U.S. mails a true and correct copy of the above reply affidavit addressed to the Hon. Robert D. Fiske, U.S. Attorney, Southern District of New York, U.S. Courthouse-Foley Square, New York, N.Y. I have also sent a copy to the clerk of the court, U.S. Courthouse-Foley Square, N.Y., N.Y.

Sworn to before me this
27 day of July, 1977


Parole Officer: Authorized by the Act of
July 7, 1955 to Administer Oaths (18 U.S.C.
4004).

James F. Heimerle
#01873
Atlanta, Ga. 30315

Hon. Robt. L. Carter
U.S. Courthouse
Foley Square
New York, N.Y.

Honorable Sir:

The enclosed motion was directed to the Clerk of the Court. The papers were not accepted, the Clerks letter is enclosed and self explanatory.

I have corrected my error insofar that your initials were omitted. However, as for complying with the Clerks proof of service request. I dont believe I know who to serve the motion on. Therefore I respectfully request that the enclosed papers be accepted in the spirit that they were intended.

And once again I apologize for mailing directly to your chambers.

Respectfully yours,

James F. Heimerle
James F. Heimerle

DATE: June 20, 1977

PS Form 3811, Nov. 1976

SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one):
☒ Show to whom and date delivered 25¢
☐ Show to whom, date, & address of delivery 45¢
☐ RESTRICTED DELIVERY.
Show to whom and date delivered 85¢
☐ RESTRICTED DELIVERY.
Show to whom, date, and address of delivery ... \$1.05 (fee shown in addition to postage charges and other fees).

2. ARTICLE ADDRESSED TO:
Hon. Robert L. Carter, U.S. District Court
U.S. Courthouse, Foley Square
New York, NY 10007

3. ARTICLE DESCRIPTION:
REGISTERED NO. _____ CERTIFIED NO. _____ INSURED NO. _____
0369550

(Always obtain signature of addressee or agent)
I have received the article described above.
SIGNATURE _____ ADDRESS _____ AUTHORIZED AGENT _____

4. DATE OF DELIVERY JUN 22 1977
POSTMARK JUN 22 1977

5. PRESS (Complete only if requested by S)

6. UNABLE TO DELIVER BECAUSE: 9.14 _____ CLERK'S INITIALS _____

Heimerle 01873

11 609 104-0-201-456

PRO SE OFFICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
OFFICE OF THE CLERK
U. S. COURTHOUSE

RAYMOND F. BURGHARDT
CLERK

FOLEY SQUARE, NEW YORK, N. Y. 10007

Date: 6-16-77

James F. Heimerle
PMB 01873
Atlanta, Ga. 30315

76 Civ. 5669

Enclosed papers are returned to you because

(xxx) ~~XXXXXXXXXXXXXXXXXXXX~~ judge's name or initials are missing if this is a pending case; or criminal case # and judge if a motion to vacate sentence.

() we believe you may have misdirected these papers, which you may have intended for another court, as we find no record of a case here

(xxx) we cannot file papers unless there is proof of service attached: either the signature of opposing attorney on the original document to be filed, acknowledging receipt of a copy; or an attestation of service by mailing ~~()~~, in which you tell the time and place of mailing, and the name and address of the attorney to whom you mailed a copy, and declare this under penalty of Perjury.

() Notice of appeal received on _____ may not be filed without a certified check or money order for \$5, made out to Clerk of Court, USDC, SDNY; or, if you are indigent, an attestation of poverty (form enclosed). We will hold your dated Notice of Appeal.

Do not telephone or write to inquire about receipt or progress of your papers, as this is what delays our processing of applications. You will be kept informed by mail WHEN SOMETHING happens. You will be notified of docket number and judge if this has not already happened; and you must then include them at the top of all future papers. Yours truly

Ms. Salton
Pro Se Clerk
By: *M. Watts*
Mrs. M. Watts
Deputy Pro Se Clerk

140

JUN 12 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES F. HEIMERLE,
Plaintiff

-against-

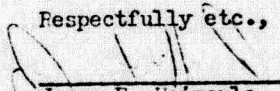
UNITED STATES OF AMERICA,
Respondent

NOTICE OF MOTION

76 Civ. 5669 (RLC)

PLEASE TAKE NOTICE that the undersigned will move this Court at a term thereof to be held on the 20th day of June 1977 at 10:00 a.m. in the forenoon, or as soon thereafter as he may be heard, pursuant to Rule 36 Federal Rules Criminal Procedure for an order directing that the docket numbers be corrected on the Courts March 3, 1977 Order denying plaintiff relief under 28 U.S.C. § 2255 for violations of the Interstate Agreement on Detainers.

Respectfully etc.,


James F. Heimerle
FNB 01873
Atlanta, Ga. 30315

DATED: June 13, 1977

5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

JAMES F. HEIMERLE,
Plaintiff

-against-

UNITED STATES OF AMERICA,
Respondent

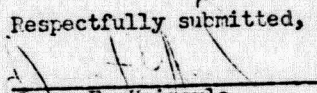
AFFIDAVIT IN SUPPORT
OF MOTION RULE 36 F.R.C.P.

76 Civ. 5669 (R-L)

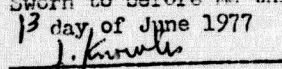
----- x

Comes now the plaintiff, JAMES F. HEIMERLE, pro se, to move this Court for an Order directing the Clerk of the Court to correct by deleting the numbers 76 Civ. 4277 from the Notice of Appeal that was filed appealing the Courts Order of March 3, 1977. Wherein the typist included the unrelated number erroneously. So the records will accurately reflect that plaintiff is not appealing from any order issued in regard to the docket number 76 Civ. 4277. Since it is obvious that the Court ruled only on the subject and the issues contained in docket number 76 Civ. 5669. And for such other and further relief as to this Court may seem just and proper.

Respectfully submitted,


James F. Heimerle
RVE 01873
Atlanta, Ga. 30315

Sworn to before me this
13 day of June 1977


DATED: June 13, 1977

FILED

JUL 27 1977

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ROBERT C. TUCKER
CLERK

77-1126

September Term, 1976

Ernest Richard Speed, Jr.,)
Appellee,)
vs.)
United States of America,)
Appellant.)

Appeal from the United States
District Court for the
Western District of Arkansas.

On motion of appellant it is now here ordered that this appeal
be, and it is hereby, dismissed.

Mandate forthwith.

July 27, 1977

51
FILED

MAY 25 1977

ROBERT C. TUCKER
CLERK

(13)

NO. 77-1126

Order of the United States District Court of May 24, 1977

58

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

ERNEST RICHARD SPEED, JR.

PETITIONER

v.

No. T-76-10-C

UNITED STATES OF AMERICA

RESPONDENT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action is a petition for a Writ of Habeas Corpus filed pursuant to Title 28 U.S.C. § 2255. A hearing was held before this Court on November 22, 1976, commencing at 9:30 a.m. and concluding at 6:07 p.m. in Little Rock, Arkansas, as agreed by all parties.

The following grounds were alleged: (1) incompetency of petitioner; (2) denial of effective assistance of counsel; and (3) failure of the prosecution to show a factual basis for the plea of guilty.

During the hearing, a supplemental petition was filed in open court which had been prepared by petitioner himself. That petition alleged that the Interstate Agreement on Detainers Act, Title 18 U.S.C. App., Ark.Stat.Ann. § 43-3201, had been violated by the United States in that the United States did not comply with Article IV(e) of the Agreement in that the petitioner was removed three times from the Cummins Unit of the Arkansas Department of Correction, placed in custody of the Federal government, and returned to State custody.

Following the hearing, the attorney for the United States, having admitted that the United States had violated the Interstate Agreement on Detainers Act and that the Writ of Habeas Corpus should be granted, and the employed counsel for the petitioner entered into the following consent order.

59

FINDINGS OF FACT

1. Petitioner Ernest Richard Speed, Jr. was convicted of the crime of robbery in June of 1973 by the Nevada County Circuit Court, Prescott, Arkansas and sentenced to a term of ten (10) years, three of which were suspended.

2. On August 14, 1973, an indictment was filed in the Western District of Arkansas against the petitioner, charging him with a violation of Title 18 U.S.C. § 2114. A detainer was lodged with the Arkansas Department of Correction, as petitioner was incarcerated at the Cummins Unit of the Arkansas Department of Correction.

3. On August 29, 1973, an Order for a Writ of Habeas Corpus Ad Prosequendum was issued directing the United States Marshal to produce the petitioner on September 14, 1973 before the United States District Court for the Western District of Arkansas, Texarkana, Arkansas. Petitioner appeared before said Court for arraignment and entered a plea of not guilty on September 17, 1973. He was thereafter returned to the Arkansas Department of Correction on September 19, 1973.

4. On October 16, 1973, an Order for a Writ of Habeas Corpus Ad Prosequendum was again issued directing the United States Marshal to bring the petitioner before the United States District Court for trial on November 5, 1973. Petitioner did so appear and withdrew his plea of not guilty and entered a guilty plea. The Court accepted that plea and returned the petitioner to State custody on November 7, 1973.

5. On November 28, 1973, the Court again issued a Writ of Habeas Corpus Ad Prosequendum to the United States Marshal to produce the petitioner before the Court on December 7, 1973. Petitioner appeared in court on that date and was sentenced to a term of twenty-five (25) years under the provisions of Title 18

60

U.S.C. § 4208(A)(1), five years fixed as the time after which petitioner could become eligible for parole. Petitioner was then returned to the Arkansas Department of Correction to complete the service of his State sentence.

CONCLUSIONS OF LAW

1. The United States of America is a party to the Interstate Agreement on Detainers, Title 18 U.S.C. App.

2. The State of Arkansas is a party to the Interstate Agreement on Detainers, Ark.Stat.Ann. § 43-3201.

3. Article IV(e) of the Interstate Agreement on Detainers provides:

"If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e), hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

4. The United States invoked the provisions of the Agreement by use of the Writ of Habeas Corpus Ad Prosequendum. *U.S. v. Mauro*, 414 F.Supp. 358 (E.D. N.Y. 1976); *U.S. v. Ricketson*, 498 F.2d 367, 373 (7th Cir. 1974); *U.S. ex rel. Esola v. Groomes*, 520 F.2d 830 (3d Cir. 1975).

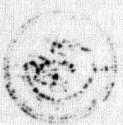
5. The United States did not comply with Article IV(e) of the Agreement in that the petitioner was three times removed from the Cummins Unit of the Arkansas Department of Correction, placed in custody of the Federal government and returned to State custody.

The petition will be granted, and the sentence imposed on him in criminal case No. T-73-CR-26, Western District of Arkansas, Texarkana Division, on December 7, 1973 will be vacated and set aside.

This Order is entered May 24, 1977, *nunc pro tunc* December 17, 1976.

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60-A



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

Honorable Robert C. Tucker, Clerk
United States Court of Appeals
for the Eighth Circuit
St. Louis, Missouri 63101

Attention: Ms. Ann Keller
Chief Deputy Clerk

Re: Ernest Richard Speed v.
United States, No. 77-1126.

JUL 26 1977
RECEIVED
JUL 29 1977
U.S. COURT OF APPEALS
EIGHTH CIRCUIT

Dear Mr. Tucker:

This is in response to your letter of June 9, 1977, addressed to United States Attorney Robert E. Johnson, in which you asked the Government's views on the posture of the above case in view of Judge Shell's most recent order.

Although we believe the judgment of the district court to be erroneous, we have decided to withdraw the appeal because of the peculiar circumstances of this case. Therefore, we ask that the appeal be dismissed.

Sincerely,

GEORGE W. CALHOUN
Chief, Special Litigation Section
Criminal Division

By: *Mitchell B. Dubick*

MITCHELL B. DUBICK
Attorney, Department of Justice
Washington, D.C. 20530
Telephone: (202) 739-2311

cc: Mr. Robert E. Johnson
United States Attorney
P.O. Box 1524
Little Rock, Arkansas 72901

Mr. Donald S. Ryan
Dodds Kidd & Ryan
Suite 205
National Investors Life Bldg.
Little Rock, Arkansas 72201



61

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ERNEST RICHARD SPEED, JR.,

vs.

UNITED STATES OF AMERICA,

Petitioner-Appellee,)

No. 77-1126

Respondent-Appellant.)

15

FILED

MOTION

ROBERT C. TUCKER
Clerk

Comes now the respondent-appellant, United States of America, by its attorney for the Western District of Arkansas, and for its Motion to dismiss this case for the reason that the Solicitor General has withdrawn authorization for the appeal.

WHEREFORE, respondent-appellant, United States of America, prays that this case be dismissed.

Robert E. Johnson
United States Attorney

By *Floyd Clardy*
Floyd Clardy
Assistant U. S. Attorney

CERTIFICATE

I hereby certify that a copy of the foregoing Motion was mailed this 25th day of July, 1977, to W. Wayne Buckner, Appeals Expediter, U. S. Court of Appeals, St. Louis, Missouri, 63101; Robert C. Tucker, Clerk, U. S. Court of Appeals, St. Louis, MO 63101; Mr. Mitchell B. Dabick, Attorney, Department of Justice, Washington, D. C., 20530, and to Donald S. Ryan, Attorney at Law, 205 National Investors Life Bldg., Little Rock, Arkansas, 72201.

Floyd Clardy
Floyd Clardy
Assistant U. S. Attorney

62
FILED

APR 27 1977

ROBERT C. TUCKER
CLERK

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 77-1126

September Term, 1976

Ernest Richard Speed, Jr.,	)	
	)	
Appellee,	)	
	)	
vs.	)	Appeal from the United States
	)	District Court for the
United States,	)	Western District of Arkansas.
	)	
Appellant.	)	

On consideration of appellee's motion for remand it is now here ordered that this cause be, and it is hereby, remanded to the United States District Court for the Western District of Arkansas having that Court's consideration on a nunc pro tunc order. The aforesaid District Court is directed, that before the entry of any nunc pro tunc order, it is to allow the Government the opportunity to present evidence, by affidavit or otherwise, in opposition to said order.

Upon determination by the aforesaid District Court whether the judgment should or should not be amended, the same shall be certified to this Court within 30 days from the date of this order.

The time for filing appellee's brief is suspended and will run from the date of the District Court's certification to this Court.

April 27, 1977

Order entered at the direction of the Court.

Robert C. Tucker
Clerk, U.S. Court of Appeals, 8th Circuit.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COURT
FILED
12-16-76
S D of NY

JAMES HEIMERLE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

Pro Se 76 Civ. 5563-CL

MEMORANDUM AND ORDER

Brieant, J.

James Heimerle, a federal prisoner now confined at Manhattan Correctional Center, seeks a writ of habeas corpus pursuant to 28 U.S.C. §2255.

The facts are directly known to the Court and are not in dispute. On December 6, 1972, petitioner and another were indicted under docket No. 72 Cr. 1331-CLB, for two substantive counts of mail fraud, and one count charging conspiracy so to do, committed on or about March 1, 1972.

At the time the indictment was filed, Heimerle was in state custody, awaiting sentence on an unrelated state crime. On December 13, 1972 he was sentenced in state court to a four year term. He was thereafter confined at Sing Sing Prison, now in newspeak called the Ossining Correctional Facility, located about an hour's travel from our Courthouse.

His federal prosecution followed the regular course as shown by the docket sheet in 72 Cr. 1331-CLB. He appeared in absentia on January 24, 1973 by attorney Panzarella. He was arraigned in person on March 19, 1973 and pleaded not guilty. Thereafter, he attended at least one pre-trial conference before me and was present in person in this Court on July 22, 1974 for a change of plea on Count 2 from not guilty, to guilty, and in reliance on a presentence report previously prepared for another case, was sentenced, on July 23, 1974. Imposition of sentence was suspended, and Heimerle was placed on probation for a period of four (4) years to commence upon expiration of a prison sentence previously imposed by Judge Carter of this Court in 72 Cr. 1330-R in which case Heimerle received a sentence of one (1) year and a day and a fine, to commence following the state sentence of December 13, 1972.

On June 15, 1976, Heimerle was sentenced by Judge Metzner of this Court in 76 Cr. 146-CMM to a term of imprisonment of seven (7) years to be followed by five (5) years probation, following conviction on four (4) counts.

On November 15, 1976, Heimerle was sentenced by Judge Pollack of this Court in 76 Cr. 442-MP, to a prison term of ten (10) years to follow (consecutively) the sentence by Judge Metzner imposed on June 15, 1976, such sentence also to be consecutive to

any sentence he may receive in a pending probation violation charge now sub judice before Judge Pollack.

On each of Heimerle's appearances before me with respect to 72 Cr. 1331-CLB, between indictment and sentence, his presence was obtained by federal writ of habeas corpus ad prosequendum, issued in the same form used since about 1790. The Court satisfied the writs after each appearance and allowed Heimerle to return to Sing Sing between court dates, and after imposition of sentence.

This was humane and proper. It assured no interruption or loss of time, good time, privileges or prison earnings on his state sentence. He had adjusted well to the structured life and programs in that institution, and in view of its nearby location, no purpose would have been served to pull him out and house him in a federal facility for the indefinite period between indictment and final disposition.

This Court never believed, prior to May 17, 1976, that enactment by Congress in 1970 of the Interstate Agreement on Detainers would be held to affect the time honored procedures followed in this case. But see United States v. Mauro, 414 F.Supp. 358 (E.D.N.Y. 1976), aff'd, October 26, 1976 (2d Cir. Dkt. 76-125 1252).

It is on the basis of Mauro that Heimerle now seeks his release. Familiarity with the opinion of the Court of Appeals in that case is assumed.

It has been said that those who enjoy sausage, and remedial legislation, should never watch it made. Often, in the sausage making process, too much offal can get into the grinder. When this happens, usually the cook adds spices and salt to correct the problem. When, as recounted in Mauro, the same thing happens with remedial legislation, a court usually places a gloss on the statute, so as to avoid an untoward result.

Those of us who respect the constitutional separation of powers, and hold that the federal courts need not take over every function of government, recognize the right of the legislative branch to be wrong. Congress knows how to legislate with specificity, and can use plain English. In penal matters the rules of strict construction and reliance on plain meaning are particularly appropriate.

As the Court of Appeals said in Mauro (p. 277):

"If the United States is to succeed in establishing that the Congress only intended to cover state detainers and not federal detainers, this would certainly represent such a major and substantial departure from the all embracing language employed in Article II, that any contrary intention

should be clearly established in the legislative history of the enactment. We have carefully reviewed that history and there is not a single mention of the United States participating only in its capacity as a sending State until the Senate Committee Report on the proposed Justice Reform Act of 1975 (S. 1). This reflects, in our view, a recognition by some members of the Congress that perhaps the Congress should not have acted as it did--that the sanctions of Article IV in particular are discomfiting to the Government. However, it is not our role to extricate the United States from the unequivocal terms of the Agreement enacted by the Congress." (Emphasis added).

The Court of Appeals having declined to put a gloss on the statute, to save our time honored and reasonable use of the ancient writ ad pros., Heimerle must go free, at least as to the judgment entered by me on July 23, 1974.

That neither he nor his lawyer protested when the successive writs were satisfied cannot be regarded as a waiver. Waiver is the intentional relinquishment of a known right. Prior to the decision of Judge Bartels on May 17, 1976, who could have known?

The petition is granted, and it is ordered that the writ shall issue. The operation of such order, and the actual issuance of the writ are stayed pending appeal, unless the Court of Appeals

shall otherwise direct.

So Ordered.

Dated: New York, New York
December 15, 1976

CHARLES L. BRIEANT

Charles L. Brieant,
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

JAMES F. HEIMERLE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

-----X

Proc Se 76 Civ. 5563-CLB

MEMORANDUM AND
ORDER ON REARGUMENT

Brieant, J.

Familiarity is assumed with our prior opinion dated December 15, 1976. The Government has sought reargument, and reargument has been granted.

We lay to rest first any suggestion on the part of the Government that the Memorandum and Order of this Court, sought to be reargued here, was granted "without the benefit of the filing of a response by counsel for the United States." As is the Court's usual practice with federal prisoner motions and petitions, a telephone call was made to the U. S. Attorney's Office by a member of staff, inquiring whether the U. S. Attorney's Office desired to file any response to the papers filed by Heimerle. This telephone communication elicited the not unusual response that the Government did not wish to answer unless the Court desired that it do so. The Court, regarding the issue presented as clear,

proceeded accordingly.

It turns out that the perceived simplicity of the issue did not exist.

The prior opinion of the Court was correct, insofar as it goes. Certainly a waiver is nothing more than the intentional relinquishment of a known right, and there was no waiver on Heimerle's part simply by the fact that he permitted the successive writs ad prosequendum to be satisfied, and was returned to the Ossining Correctional Facility without protest on his part.

There is, however, another point to the case which was not elicited in the prior proceedings, and did not come to the attention of this Court until reargument, that is, that Heimerle pled guilty to the charges. This distinguishes the cases relied on, including the subsequent case of United States v. Ford, Dkt. No. 76-1319, 2d Cir. February 3, 1977.

A knowledgeable plea of guilty waives all remedies, and admits guilt. Taking such a plea includes an assumption of risk by the defendant of any error in either his or his attorney's assessment of the law and facts. McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970).

Here, Heimerle lost out with respect to a right which

11

no person skilled in the law then would have imagined existed in his favor. Had he gone to trial on the merits and been convicted, the Court would believe that this right was still preserved to him, and would adhere to its prior decision. The defense of waiver would have no meaning, in connection with the acquiescence by Heimerle in the procedure, actually beneficial to him, involved in the satisfaction of the successive writs, discussed more fully in the Court's prior opinion.

But, there is a different waiver present in the taking of a knowledgeable plea of guilty, intelligently and intentionally given, as in fact happened in this case. The entry of the plea of guilty in the Court is sufficient to end the matter, and does constitute a waiver of the rights granted under the Mauro decision.

Accordingly, the Court's decision and order dated December 15, 1976 is in all respects vacated, and it is determined that all relief shall be denied with respect to the petition herein.

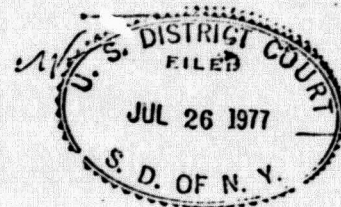
The Clerk shall enter judgment to that effect, pursuant to Rule 58, F.R.Civ.P.

So Ordered.

Dated: New York, New York
July 6, 1977

CHARLES L. BRIEANT
Charles L. Bricant
U. S. D. J.

Clc



Endorsement

JAMES F. HEIMERLE, Petitioner, v. UNITED STATES OF AMERICA, Respondent.

Pro Se 76 Civ. 5563-CLB

The within motion to reargue is denied. The issues set forth therein have previously been considered by the Court.

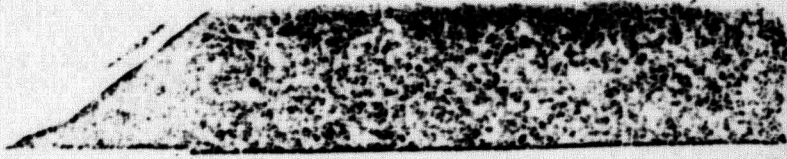
So Ordered.

Dated: New York, New York
July 25, 1977

Charles L. Bricant
Charles L. Bricant
U. S. D. J.

MICROFILM
JUL 26 1977

CLERK
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
U. S. COURT HOUSE - FOLEY SQUARE
NEW YORK, N. Y. 10007
OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE \$300



OCT 8 1976

OCT 26 1976
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OFFICER OF THE CLERK (pro-se)
United States District Court
Southern District of New York

October 5, 1976

RE: 76 - Civ. 4277 (R L C)

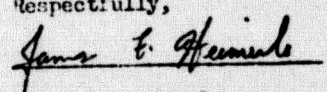
Dear Ms. Satten:

I have enclosed a copy of the amended writ that was originally submitted, pursuant to your request of September 30, 1976.

A copy has been deposited in the mails on this Fifth day of October Nineteen Hundred Seventy Six, to the Warden of the Metropolitan Correctional Center, New York, N.Y.

Affidavit of mailing is affixed to the original writ, as per your order.

Respectfully,



James F. Heinerle
150 Park Row M.C.C.
New York, New York 10007

74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
NEW YORK, N.Y. 10007

JAMES HEIMERLE,
Defendant,*

vs.

UNITED STATES OF AMERICA*
Respondent*

Civil Action No.

(72 Cr. 1330)

76 Civil 4277 Rolo Co

Petition For A Writ Of Error Coram Nobis

Comes now petitioner James Heimerle, in propria persona, and moves this Court pursuant to Title 28, United States Code, Section 1651, the "All Writs Act" to entertain this petition for a Writ of ERROR CORAM NOBIS, to vacate the sentence and set aside the conviction imposed on him by the Honorable Robert L. Carter, United States District Judge, in Criminal Case No. 72 Cr. 1330, on ~~July 15, 1975~~ ^{JUNE 18, 1973}, and in support hereof, the petitioner does aver:

(1) That he is presently in Federal Custody at the United ~~States Penitentiary, Atlanta, Georgia,~~ ^{METROPOLITAN CORRECTIONAL CENTER NY NY} serving a sentence of seven (7) years imposed on him in this Court, on an unrelated charge to the sentence now contested.

(2) Petitioner submits that the sentence imposed on him in Criminal Case No. 72 Cr. 1330, on ~~July 15, 1975~~ ^{JUNE 18, 1973}, to the term of one (1) year and one (1) day on each of Counts one and two to run concurrently with each other was constitutionally invalid, null and void, in that it was issued in violation of the petitioner's rights under the Fifth, Sixth and Fourteenth Amendment to the Constitution of the United States; in that:

(a) The New York County District Attorney did encroach into other counties to submit Application for wiretapping and wiretap warrants wherein the petitioner was a direct party to the intercepted and recorded conversations.

75

(b) The New York County District Attorney's failure to report all applications and interceptions in their "Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications", submitted once a year to Washington, which would have proved beyond a doubt that no minimization was followed, and as a result, caused a deception, not only on the District Court - during the trial, but also on the Second Circuit Court of Appeals.

(c) The petitioner was not aware of the grounds underlying this motion when he filed his appeal above mentioned.

BASIS FOR THE RELIEF SAUGHT

Section 2516(2) of Title 18, as found in S Rep No. 1097, supra at 98: "Paragraph (2) provides that the principal prosecuting attorney of any State or the principal prosecuting attorney of any political subdivision of a State may authorize an application to a State judge of competent jurisdiction...for an order authorizing the interception of wire or oral communications the interception of wire or oral communications. The issue of delegation by that officer would be a question of State law. In most States, the principal prosecuting attorney of the State would be the attorney general. The important question, however, is not name but function. The intent of the proposed provision is to provide for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officer of the State....Where no such office exists, policymaking would not be possible on a statewide basis; it would have to move down to the next level of a State, usually the county, which would be the District Attorney, State's Attorney, or a County Solicitor. The intent...is to centralize statewide law Attorney General anywhere in the State and the District Attorney anywhere in the County. The proposed provision does not envision a further breakdown. Although city attorney's may have in some places limited criminal prosecuting jurisdiction, the proposed provision is not intended to include them.

'Who may apply' The Blakey Bill provides that applications for wiretapping or eavesdropping orders may be made by only a limited number of persons. At the federal level these are the Attorney General of the United States or an Assistant Attorney General, and at the State level they are the State Attorney General or the principal prosecuting attorney of a political subdivision (such as a County or City District Attorney).

The fact remains that the late Frank Hogan, the New York County District Attorney, did submit applications to obtain eavesdropping and wiretap warrants in the Counties of Kings, Queens and Richmond which he was not the principal prosecuting attorney thereof; see the Applications for the February, March, April, May and June, for the Manhattan Beach Hotel Order, the Vincent Lee residence Order, the Marie Tulino residence Order, the Mildred DiLorenzo residence Order, the Matteo DiLorenzo residence Order, all located outside the County of New York which the late Mr. Hogan obtained warrants after submitting applications within those Counties.

Furthermore, in the Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications - submitted to Washington - for the period between January 1972 through December 1972, there appears no listing made reflecting Mr. Hogan authorizing applications in the Counties of Kings, Queens and Richmond. The only applicants for Kings County was one; Mr. Gold, who is the principal prosecuting attorney for Kings County. For Queens County, the only applicant was a Mr. Mackell, the principal prosecuting attorney for that County. For Richmond County, the only applicant was a Mr. Braisted, the principal prosecuting attorney for that County.

Accordingly, the petitioner verily believes that all the warrants predicated upon the applications submitted by Mr. Hogan to other counties, other than within his jurisdiction were contrary to law, and thus should have been suppressed. As a result of their introduction during petitioner's trial, they were certainly the basis for the conviction upon this petitioner, therefore, they should have been suppressed before the trial, and thus not introduced.

WHEREFORE, the petitioner prays that this Court Order the Government to Show Cause on a date certain why this Petition for a Writ of Error Coram Nobis should not issue, and that after a finding of fact from the Motions, Records, law pertaining to this issue, that the Court grant the Writ and issue forthwith a Order Dismissing the Indictment, and Vacating the Sentence and Conviction entered in Criminal Case No. 72 Cr. 1330, and for what ever other relief the Court may deem just.

Respectfully submitted,

James F. Heimerle
James F. Heimerle, Petitioner
Box PHB,
Atlanta, Ga. 30315

CERTIFICATE OF SERVICE BY MAIL

I, James Heimerle, this petitioner, hereby certify that a copy of the foregoing "Petition for a Writ of Error Coram Nobis" to the Office of the United States Attorney, for the Southern District of New York, by placing it in the United States Mails and sending it by Certified Mail Return Receipt Requested on this day of , 1976.

James F. Heimerle

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 16 DAY OF July, 1976

[Signature]
Parole Officer

I, James Heimerle, this petitioner, hereby certify that a copy of the foregoing "Petition for a Writ of Error Coram Nobis" to the Office of the United States Attorney, for the Southern District of New York, by placing it in the United States Mails and sending it by Certified Mail Return Receipt Requested on this day of , 1976.

[Signature]
Parole Officer

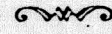
SD
76 CW 4277

Rec'd 8/3/77
70

PRO SE
8/2/77
77-2060

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 24th day of August, one thousand nine hundred and seventy-seven.

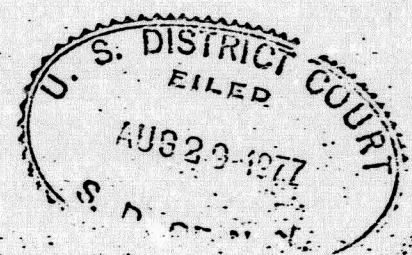
James F. Heimerle,

Appellant,

v.

United States of America,

Appellee.



Appellant

A motion having been made herein by ~~XXXXX~~ pro se for ~~XXXXX~~ of probable

~~XXXXX~~ for leave to proceed in forma pauperis for transcription of the minutes of the

~~XXXXX~~ for the assignment of counsel and for

Upon consideration thereof, it is

Ordered that said motion be and it hereby is DENIED; and it is

FURTHER ORDERED that the appeal be & it here by
is DISMISSED.

WHT MIG EVG

W. H. Thompson
W. H. Thompson
W. H. Thompson
Circuit Judges

A true copy.

A. Daniel Fusaro,

by S. P. Pavia, Deputy Clerk.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

JAMES F. HEIMERLE, :
Petitioner : 76 Civ. 5563 (CLB)

-v- :

UNITED STATES OF AMERICA, :
Respondent. :

----- x

GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S
APPLICATION PURSUANT TO
28 U.S.C. § 2255

On December 3, 1976 defendant Heimerle "moved" in this criminal case, pursuant to 28 U.S.C. § 2255,^{1/} for an order vacating the sentence imposed upon him, permitting him to withdraw his plea of guilty to Count 2 of Indictment • 72 Cr. 1331 and dismissing the Indictment. He based his application on the Interstate Agreement on Detainers Act, 18 U.S.C. Appendix (Pub. L. 91-538, §§ 1-8, Dec. 9, 1970) ("the Act"). On December 15, 1976, the Honorable Charles L. Brieant issued a memorandum and order pursuant to Heimerle's

^{1/} Procedurally, it is arguable that defendant should have first filed a motion pursuant to Fed.R.Cr.P. 32(d), and then, if unsuccessful, pursued his habeas remedies under 28 U.S.C. § 2255. However, because a Rule 32(d) motion would have most certainly failed, the Government has no objection to proceeding under 28 U.S.C. § 2255 at this time. Technically, of course, the application under 28 U.S.C. § 2255 should have been filed as a separate civil action in this Court. However, in order to get to the merits, the Government has no objection to the Court's deeming this application as properly filed, and will so treat it in this Memorandum.

80
76-1576

To be argued by
ALAN R. NAFTALIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1576

UNITED STATES OF AMERICA,

Appellee,

—v.—

**RICHARD G. WARME, a/k/a. "RICHARD WARNER,"
and JAMES F. HEIMERLE,**

Defendants-Appellants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

**ALAN R. NAFTALIS,
FREDERICK T. DAVIS,**
*Assistant United States Attorneys,
Of Counsel.*

background clearly permit the Court to find, as it did, that the defendant was dangerous under the provisions of Section 375(b).**

As a second basis for claiming a deprivation of due process, Heimerle notes that one of the convictions considered in the sentencing has since been set aside on collateral attack. The Government concedes that one federal conviction has been subsequently set aside in the Southern District of New York due to a procedural violation of the Interstate Agreement on Detainers.* However, Heimerle had four felony convictions in addition to the conviction set aside at the time of sentencing in this case. These convictions include two New York State felony convictions; the conspiracy and substantive counterfeiting felonies for which the defendant was convicted before Judge Metzner in May of 1976; and the instant conviction before Judge Pollack for violation of the conspiracy statute 18 U.S.C. §371. Pursuant to the provisions of Section 3575(e)(1) the remaining convictions clearly provided a sufficient basis for the finding of Judge Pollack that the defendant was a Dangerous Special Offender.

Heimerle also argues that the Court relied upon hearsay evidence in its sentencing in that it considered the pre-sentence report prepared by the Probation Department.* This claim ignores both the general law governing

** The procedural regularity of the sentence was enhanced by the careful oral opinion delivered by Judge Pollack on his reasons for imposing the sentence (A. 386-92)

* It should be noted that Judge Pierce's decision vacating the conviction is presently on appeal to this Court.

* The specific item in the Probation Department Report the defendant objected to was the December 1975 evaluation of the defendant's unit manager in the Federal Halfway House. This evaluation noted "prognosis is poor there is nothing in his behavior to indicate that he [Heimerle] has in any substantial degree gained any desire or intent to lead a law abiding existence [Footnote continued on following page]

NOT AT SENTENCING;
AT HEARING

NOT SO



STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES
DEPARTMENT OF CORRECTION

GREEN HAVEN ~~PERKINS~~ CORRECTIONAL FACILITY
STORMVILLE, N. Y.

DEPARTMENT OF CORRECTIONAL SERVICES

WARDEN

Leon J. Vincent
Superintendent

NOTICE OF UNTRIED INDICTMENT, INFORMATION OR COMPLAINT
AND OF RIGHT TO REQUEST DISPOSITION

Inmate JAMES HEIMERLE No. 19111

Pursuant to the provisions of Section 669-a of the Code of Criminal Procedure, as enacted by Chapter 440 of the Laws of 1957, you are hereby informed that the following are the Untried Indictments, Informations or Complaints against you concerning which the undersigned has knowledge, and the source and contents of each: **Southern District of New York, 72 Cr. 1330**
One year on each of counts 1&2 to run concurrently with each other. Sentence to commence upon his release from confinement under State sentence defendant is presently serving at N.Y. State Penitentiary, Green Haven New York. Defendant is fined \$1,500 on count 1 only. If the fine is not paid as directed, the defendant is to be committed or he is otherwise charged according to law.

You are hereby further advised that by the provisions of said statute you have the right to request the District Attorney of the county in which any such Indictment, Information or Complaint is pending and the appropriate court that a final disposition be made thereof. You shall then be brought to trial within 180 days after you have caused to be delivered to said District Attorney and said court written notice of the place of your imprisonment and your said request, together with a certificate of the Commissioner of Correction as more fully set forth in said statute. However, for good cause shown in open court in the presence of your counsel or yourself, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Should you desire such a request for final disposition of any Untried Indictment, Information or Complaint, you are to notify the Head Clerk of the institution in which you are confined.

DATED: July 9, 1973

cc: Dept. Supt.
Parole
Inmate
File

PETER PREISER

THOMAS J. McHUGH

COMMISSIONER OF CORRECTIONAL SERVICES

By

RECEIVED

Warden
Superintendent

DATE _____

INMATE _____ No. _____

UNITED STATES DISTRICT COURT

CHAMBERS OF
JUDGE ROBERT L. CARTER
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

July 21, 1977

Mr. James F. Heimerle
PMB 01873
Atlanta, Georgia 30315

Dear Mr. Heimerle:

Judge Carter has asked me to write you by way of response to your recent motion for a statement of the court's findings of fact and conclusions of law with regard to 76 Civ. 4277. Your filing two separate civil actions with respect to a single criminal indictment — 72 Cr. 1330 — has occasioned considerable administrative confusion. In 76 Civ. 4277 you alleged that you were convicted in federal court on the basis of illegally obtained state wiretaps. In 76 Civ. 5669 you claimed that a violation by the federal government of the Interstate Agreement on Detainers Act entitled you to a dismissal of your indictment with prejudice. On June 22, 1977, Judge Carter, upon reconsideration, granted your request in 76 Civ. 5669 to dismiss Indictment 76 Cr. 1330. Dismissal of the indictment made moot any issues raised in 76 Civ. 4277; consequently, it served to dispose of both cases. Both matters have therefore been officially closed.

Since the claims in 76 Civ. 4277 are now moot, a decision of their merits is beyond the scope of the court's power. They no longer present a live "case or controversy" which the Constitution requires before a federal court may exercise its authority. Accordingly, the need for findings of fact and conclusions of law is obviated; and the closing of both cases should as well make unnecessary any additional action on your part with respect to either matter.

I hope this letter answers all your questions and solves any problem you may have.

Yours truly,

Michael E. Robinson
MICHAEL E. ROBINSON
Law Clerk to Judge Carter

cc: Pro Se Office, S.D.N.Y.
File Room